No. 83-1659

(3)

Supreme Court, U.S.
FILED
JUL 23 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STANLEY McDONALD, NORMAN R. HAGFORS, and CLAYTON JENSEN,

Petitioners,

—v.—

JOHNSON & JOHNSON,

Respondent.

BRIEF OF RESPONDENT JOHNSON & JOHNSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID F. DOBBINS
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Counsel for Respondent Johnson & Johnson

Of Counsel:

GEORGE S. FRAZZA
ROGER S. FINE
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933
Telephone: (201) 524-0400

BEST AVAILABLE COPY

19PP

QUESTIONS PRESENTED

1. Do sellers of a business have standing to maintain a treble damage action under the antitrust laws against the purchaser because the sale price is determined in part by the future profits, if any, made from that business by the purchaser?

2. Can a company's alleged failure to promote a business which it lawfully acquired under the antitrust laws constitute a contract, conspiracy or combination in restraint of trade in violation of Section 1 of the Sherman Act?

3. Should this Court undertake a factual reassessment of the Eighth Circuit's ruling that "the damages awarded by the jury for the antitrust violation were entirely speculative?"

4. Should this Court undertake a re-evaluation of the Eighth Circuit's ruling that the invalid antitrust suppression theory was an improper and prejudicial basis for obtaining punitive damages on the common law fraud claim?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	1
I. THE ISSUE OF STANDING AND THE PROPRIETY OF THE ANTITRUST SUPPRESSION THEORY AS APPLIED TO A LAWFULLY ACQUIRED BUSINESS SHOULD BE REVIEWED	9
II. THE STRIKING OF THE ANTITRUST DAMAGES AS SPECULATIVE AND REVERSAL OF THE PUNITIVE AWARD ON THE IMPROPER SUPPRESSION THEORY SHOULD NOT BE REVIEWED	11

TABLE OF AUTHORITIES

Cases	PAGE
A.D.M. Corp. v. Sigma Instruments, Inc., 481 F. Supp. 1297 (D. Mass.), *aff'd*, 628 F.2d 753 (1st Cir. 1980)	9
Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8th Cir. 1978)	7
Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1982)	1
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	1
Bosse v. Crowell Collier and MacMillan, 565 F.2d 602 (9th Cir. 1977)	9
Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981)	9
Copperweld Corp. v. Independence Tube, 52 U.S.L.W. 4821 (U.S. June 19, 1984)	11
Essington v. Parish, 164 F.2d 725 (7th Cir. 1947)	3
McDonald v. Johnson & Johnson, 537 F. Supp. 1282 (D. Minn. 1982)	3, 5
McDonald v. Johnson & Johnson, 546 F.Supp. 324 (D. Minn. 1982), *rev'd*, 722 F.2d 1370 (8th Cir. 1983)	5, 10
Minneapolis, St. P. & S.S.M. Ry v. Moquin, 283 U.S. 520 (1931)	2
Northwestern State Bank, Osseo v. Foss, 293 Minn. 171, 197 N.W.2d 662 (1972)	2
Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950)	7
Roberts v. Sears, Roebuck & Co., 617 F.2d 460 (7th Cir.), *cert. denied*, 449 U.S. 975 (1980)	2

PAGE

Roberts v. Sears, Roebuck & Co., 531 F. Supp. 784 (N.D. Ill. 1982) 9

Theatre Enterprises v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) 7

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 7

Turner v. Johnson & Johnson, 549 F. Supp. 807 (D. Mass. 1982) 9

United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) 4

United States v. Temple, 299 F.2d 30 (7th Cir. 1962) ... 3

V.T.R., Inc. v. Goodyear Tire and Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969) 9

Wesson v. United States, 172 F.2d 931 (8th Cir. 1949) .. 7

Statutes

Clayton Act, § 4 (15 U.S.C. § 15) 10-11

Clayton Act, § 7 (15 U.S.C. § 18) 4

Sherman Act, § 1 (15 U.S.C. § 1) 8-11

Secondary Authorities

Dobbs, *Remedies* § 1.5 (1973) 3

V. Areeda & Turner, *Antitrust Law* ¶ 1123a (1978) 4

50 C.J.S. Judgments § 676 3

No. 83-1659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STANLEY McDONALD, NORMAN R. HAGFORS, and CLAYTON JENSEN,

Petitioners,

—v.—

JOHNSON & JOHNSON,

Respondent.

BRIEF OF RESPONDENT JOHNSON & JOHNSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Statement of the Case

Both sides to this case have filed petitions for certiorari. We believe that the issues raised by our petition are worthy of review, for the reasons set forth therein. Taken alone, the issues raised by plaintiffs' petition are not worthy of review. The Eighth Circuit's dismissal of the $170 million antitrust judgment for lack of standing is supported by similar decisions in several other circuits and district courts (see fn. 2 p. 9, *infra*), and is consistent with this Court's antitrust standing requirements, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1982). Moreover, the

Eighth Circuit's remand of the $31 million compensatory and punitive fraud judgments was compelled by historic decisions of this Court and of other circuits holding that "no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Minneapolis, St. P. & S.S.M. Ry v. Moquin*, 283 U.S. 520, 521 (1931). See remaining cases cited at footnote 6 of J&J Petition for Certiorari. Furthermore, plaintiffs' attempt to convince this Court that it is an antitrust violation for a company to "suppress" (*i.e.*, fail to promote as much as a jury thinks it should have) one of its lawfully-acquired businesses flies in the face of all antitrust theory as well as decisions of this Court.

Nevertheless, if our petition is granted, then we believe it would be appropriate to grant plaintiffs' petition to the extent that it seeks review of the two antitrust issues of antitrust standing and the validity of plaintiffs' "suppression" theory. We would not oppose review of these two issues because a decision by this Court holding these plaintiffs to lack antitrust standing and declaring plaintiffs' "suppression" theory to be inimical to the purposes of the antitrust laws would have the ameliorative effect of saving the judiciary and litigants from the lengthy trial of such baseless antitrust lawsuits. In this connection, it is noteworthy that this case took six months to try.

On the other hand, should the Court deny J&J's petition, the issues raised in plaintiffs' petition are not ripe for review. This is the case because plaintiffs stipulated and the trial court entered a judgment explicitly providing that the contract, fraud and antitrust verdicts were to be entered as alternative judgments redressing a single alleged injury. It is J&J's position that plaintiffs' obtaining full satisfaction on one of those alternative claims—the contract—bars them under settled law from seeking to augment recovery under the other alternative claims, antitrust and fraud. *E.g.*, *Northwestern State Bank, Osseo v. Foss*, 293 Minn. 171, 197 N.W.2d 662 (1972); *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460 (7th Cir.), *cert. denied*, 449 U.S. 975 (1980); *United States v. Temple*, 299 F.2d 30 (7th Cir.

1962); *Essington v. Parish*, 164 F.2d 725, 730 (7th Cir. 1947); 50 C.J.S. Judgments § 676, p. 121-2; Dobbs, *Remedies* § 1.5, pp. 19-22. (1973).

In April 1984 the plaintiffs obtained an order from the trial court permitting them to obtain still further satisfaction under the alternative theories. That order, which J&J contends is clearly erroneous, has not been reviewed by the Eighth Circuit. Accordingly, unless J&J's position for certiorari is granted and the remaining alternate judgment on the contract claim is reversed, it is J&J's position that the case is over. Since the trial court's ruling to the contrary has not been reviewed by the Eighth Circuit, a denial of J&J's petition for certiorari necessarily renders the issues sought to be reviewed in plaintiffs' petition not ripe for review by this Court.

With this brief preliminary statement of J&J's position, we will now turn to the facts to correct the distortions occurring in plaintiffs' petition. Plaintiffs seek to pull off the same semantic stunt successfully used with the jury. They equate as interchangeable "suppression" of the business which they sold to J&J, StimTech, with "suppression" of the entire relevant product market in which StimTech competed with its TENS device. For instance, on pages 3 and 12, they state that the violation here was the acquisition of StimTech "for the purpose of suppressing it." Yet, on page 2, they characterize the case as involving "acquisition of a new idea or a product for the purpose of suppressing it", and this theme is constantly reiterated throughout their petition; *see*, *e.g.*, pp. 10, 21, 15. But J&J did not acquire substantial market power in the TENS market through its purchase of StimTech. Judge Lord himself conceded the undisputed facts about the nature of the market as follows (537 F.Supp. 1282, 1342 (D.Minn. 1982)):

> ". . . TENS devices are relatively easy to make and have no patent protection. The market, once established, would then be rather easy to enter. Mr. Smale, Managing Director of Devices [the J&J TENS distributor in England] testified 'In my view it is a unit where you could spend an enormous amount of money getting the market

established and then somebody else can undercut you as easy as winking.' "

Contrary to the claims made by plaintiff that the verdict showed that J&J acquired StimTech for the purpose of "suppressing" the TENS market, the jury found that J&J's acquisition did not violate Section 7. It returned this verdict on an instruction that it should find such a violation if it believed that J&J's presence "reduced the competitive structure of the TENS market by raising artificial entry barriers and by dissuading smaller firms from aggressively competing." (Tr. 12, 783). Stated differently, the jury found that J&J's purchase of StimTech was not an acquisition that *may* tend substantially to lessen competition. Where, as here, the market is competitive and entry is easy, the acquisition of a potential competitor in that market is not unlawful. *E.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 630 (1974); V. Areeda & Turner, *Antitrust Law* at ¶ 1123a (1978). On the undisputed facts, any other finding by the jury would have been unsustainable.

From four firms in 1974 (the year J&J acquired StimTech), the TENS market expanded to thirty to forty firms as of the time of trial (Tr. 8846-47; 8891; 10,881, 11,728), and TENS industry sales increased 15-fold from $2 million in 1947 to $32 million by 1979 (PX-1099, p. 36A; PX-567, p. 1-5), a rate of expansion unsurpassed by any other medical device.

Little technological expertise or capital outlay is required to design and build a TENS unit. In addition, ease of entry is encouraged by the lack of brand preference among TENS customers. No particular model has any clear superiority in efficacy (Tr. 8836; 8886). Due to competitive intensity no firm earned as much as $1 million in total over the course of 1975-1979 (DX-158)—less than what plaintiffs netted from the sale of StimTech. The major TENS competitors (not including StimTech) collectively lost $5.5 million in 1975-79 (DX-158).

Consequently, J&J's entrance into this highly competitive TENS market through acquisition rather than through its own

internal development is completely irrelevant. The issue here was whether J&J lawfully operated its own TENS business, not whether it lawfully entered the TENS market.

It is likewise undisputed that J&J engaged in no anti-competitive conduct. The proof showed that it interfered with no supplier or customer of any competitor by such devices as tie-ins, boycotts, exclusive dealing, or the like. Nor is there evidence that J&J engaged in any other anti-competitive conduct involving the use of its financial resources to occupy the field, take customers from competitors by deceptive means, or otherwise impair competitors' ability effectively to stay in the market.

The so-called "suppression" with which J&J was charged was that it should have taken *affirmative steps* to make a bigger success of its own TENS business, ostensibly because its doing so would benefit its competitors. As to this argument, the following observation by the Eighth Circuit, *McDonald v. Johnson & Johnson,* 722 F.2d 1370, 1378-9 (8th Cir. 1983), is a truism:

> "In this regard, it is difficult to understand just how the competition in the TENS industry was harmed—ST's [StimTech's] competitors arguably were better off by J&J's suppression of its own TENS product. Even if the competitors were not better off, J&J had no duty to competitors or consumers to promote its own product. This is an internal, private business decision."

Paradoxically the plaintiffs argued to the jury, and Judge Lord sustained the liability verdicts on the basis that J&J was the only company that was capable of funding the "massive spending campaign necessary to promote TENS." According to plaintiffs and Judge Lord, J&J was guilty of "suppression" for not deliberately committing acts of corporate waste because only it "had the resources, the experience, or the marketing organization to accomplish this task of education [of the public and medical profession in the use of TENS]" (537 F.Supp. at 1334-35). Such "suppression" is proof of neither anti-competitive nor antitrust injury. It is no wonder that

plaintiffs assert that if they "cannot sue, no one will" (p. 17). The reason no one else will sue is that no one suffered any harm at all, much less harm actionable under the antitrust laws.

Not only was there no suppression of the TENS market but the undisputed facts also reveal that J&J did not "suppress" StimTech, its own TENS business, in any sense of the word that could be unlawful under any concept. During the five years of the earnout period, it pumped over $10 million of working capital into StimTech, $3 million of which was devoted to research and development; at the same time it was sustaining operating losses of over $7 million. (Tr. DX-110, DX-335, DX-340; Tr. 6061-62; 10,169-73). During this period J&J increased StimTech sales of TENS devices sevenfold and it was always the number one or number two company throughout these years in an intensely competitive market (DX-335; DX-110).

Plaintiffs seek to dismiss these undisputed facts with the glib assertion that such financing amounted to "denying funds to the business" (p. 9). Obviously, in any company composed of separate operating units, as is the case with J&J, the allocation of funds by the parent to various operating subsidiaries involves a decision with respect to any one operating unit not to spend more than the amount actually allocated. All such decisions, which are made daily by all businesses, large and small, as a matter of semantics could qualify as "suppression" in some sense of the word and anyone in hindsight can argue, as plaintiffs did to the jury, that more might have been spent. But a decision by J&J not to spend more than $10 million and not to sustain losses greater than $7 million does not amount to "suppression" in any legal sense of the word.

In fact there is not a shred of direct evidence indicating an intent by J&J to deliberately maim itself by mismanaging its wholly owned subsidiary. Plaintiffs' laundry list of acts of supposed mismanagement consists in its entirety of legitimate judgment calls by management, and even plaintiffs concede

that each and every decision they criticize was consistent with good faith business judgment (Plaintiffs' j.n.o.v. br. p. 450). Proving a charge of intentional infliction of business injury in the absence of direct evidence requires proof that the acts done are unarguably inconsistent with the self-interest of the defendant. *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978); *Pevely Dairy Co. v. United States*, 178 F.2d 363, 370 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (" 'Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions' ") (quoting *Wesson v. United States*, 172 F.2d 931, 933 (8th Cir. 1949)).

As a surrogate for proof of direct wrongdoing, plaintiffs concocted a "guilt-through-size-and-past-success" theory. This bill of attainder was predicated on the notion that because J&J was a large company and because it had profitably operated large businesses in other health care areas, the jury should infer that its failure to make its TENS business fabulously successful (thereby enriching itself as well as the plaintiffs) was deliberate. Indeed, this was plaintiffs' main argument. It is akin to arguing that if the Washington Redskins win the Super Bowl one year their failure to repeat the following year must have been deliberate. Most of the six months trial was devoted to this irrational theory and it was done by parading to the jury in exquisite detail the profits, the expenditures and marketing strategies made in various lines of other businesses run by J&J. To be sure that the jury accepted this "guilt-through-size-and-past-success" theory as a plausible one, the plaintiffs vigorously pushed it on summation, and proposed the following charge which Judge Lord gave as one of his critical instructions to the jury (Tr. 12,738-39):

"EVIDENCE OF DEFENDANT'S SIZE

"In your consideration of the antitrust claims in this case, you may take into account defendant's size, its marketing practices . . . the magnitude and nature of defendant's advertising . . . trade connections, personnel, abilities . . . You may consider these factors as bearing on defendant's motive and intent in acquiring and *operating StimTech and defendant's ability to make StimTech profitable and successful, or to suppress it.*"[1] (Emphasis added.)

This "guilt-through-size" charge served as the foundation for a *per se* violation of the antitrust laws and *a fortiori* a willful breach of J&J's contract to operate StimTech in good faith by virtue of Judge Lord's charging the jury as follows (Tr. 12,735-36):

"FORECLOSURE FROM A SUBSTANTIAL MARKET

* * *

If you find that defendant was a dominant firm, that TENS was potentially competitive with defendant's products, and that defendant intentionally suppressed TENS from entering a substantial market, then defendant has committed a violation of Section 1 of the Sherman Act *without regard to any considerations of reasonableness or effects in a relevant market. If you find such suppression, you need not inquire further as to the reasonableness of the suppression of its effects in any relevant market.*" (Emphasis added).

To summarize, through the manipulative use of the term "suppression", through evidence devoted to defendant's size

---

1 Judge Lord drove this home by reading this "evidence of defendant's size" charge twice and telling the jury between the two readings (Tr. 12,739): "let's just read that over now, and you think through the evidence as you've heard it argued here as we go over this."

and profits in other lines of business and funds expended in marketing other products, improper presumptions, and inflammatory jury charges and arguments, plaintiffs managed to "prove" what is inherently irrational: that J&J engaged in a deliberate act of self-mutilation by intentionally mismanaging its own TENS business, i.e. "suppressing" it.

ARGUMENT

I. THE ISSUE OF STANDING AND THE PROPRIETY OF THE ANTITRUST SUPPRESSION THEORY AS APPLIED TO A LAWFULLY ACQUIRED BUSINESS SHOULD BE REVIEWED

As noted, it is J&J's position that in the event its petition for certiorari is granted, certiorari should also be granted to review the issue of standing as well as the closely related issue of the underlying alleged Section 1 violation, "suppression" of a lawfully acquired business. Earnout clauses are, as noted in the Department of Justice amicus brief submitted to the Eighth Circuit, a common way for an established corporation in effect to share the risk with an entrepreneur when it acquires a new business. Lawsuits purportedly brought under the antitrust laws by the disgruntled sellers under these or similar clauses are in fact common.[2]

As the instant case demonstrates, such a charge, if upheld by the particular district court, can be converted into a terrifying

---

2 Among the cases beside the instant one involving antitrust charges brought by disgruntled sellers of a business are the following: *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *Bosse v. Crowell Collier and MacMillan*, 565 F.2d 602 (9th Cir. 1977); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 481 F. Supp. 1297 (D. Mass.), *aff'd*, 628 F.2d 753 (1st Cir. 1980); *Turner v. Johnson & Johnson*, 549 F. Supp. 807 (D. Mass 1982) (this action was brought by the same attorneys for the plaintiffs in the instant case charging J&J with acquiring an electronic thermometer company for the purpose of "suppressing it" and the electronic thermometer market); *Roberts v. Sears, Roebuck & Co.*, 531 F. Supp. 784 (N.D. Ill. 1982); *V.T.R., Inc. v. Goodyear Tire and Rubber Co.*, 303 F. Supp. 773, 783 (S.D.N.Y. 1969).

vehicle of prejudice. The immensity of the treble damage award here, $170 million, even though it was patently frivolous, served as a basis for an avalanche of prejudicial publicity against J&J. The plaintiffs, as well as Judge Lord, who personally distributed his n.o.v. opinion in advance to the press, were bent upon generating as much publicity as possible about this award. They tried to convince the press and the public that a verdict of this size in a federal court could only be returned against a malefactor bent upon suppressing a market in the health care business—i.e., a deliberate deprivation of beneficial therapy. Judge Lord summarized what he conceived to be the effects of this publicity in his opinion awarding plaintiffs attorneys' fees under Section 4 of the Clayton Act, *McDonald v. Johnson & Johnson,* 546 F. Supp. 324, 335 (D. Minn. 1982), *rev'd,* 722 F.2d 1370 (8th Cir. 1983), as follows:

> "Moreover, the benefits resulting from the verdict are becoming increasingly obvious. The jury found, and this Court agrees, that by Johnson & Johnson's suppression of StimTech and the TENS device, it successfully kept the majority of the people in the world who suffer from pain away from a potential cure. Johnson & Johnson sold addictive and debilitating drugs to patients while continuing to suppress TENS therapy which, if utilized, would have permitted those very patients to live a pain-free existence with no side effects. However, since the jury returned its verdict in 1981, widespread publicity about this case has been instrumental in making the public and the medical profession aware of the existence and remarkable benefits of the TENS device, despite the defendant's apparent efforts to continue to keep people in ignorance about TENS. Although these benefits have been immediate, the long-term advantages to the public of the dissemination of this invaluable information are incalculable."[3]

---

3 In point of fact the rate of increase in TENS sales since 1980, the year prior to the $170 million verdict was returned, has been virtually flat, as contrasted with its dramatic surge during the late 1970's. TENS

We go into the foregoing in some detail to demonstrate that laying to rest once and for all the notion that a seller of a business under an earnout gets an antitrust club to hold over and use against the purchaser is a task worthy of consideration by this Court.

Moreover, because the issue of antitrust standing is closely related to antitrust injury, the Court should consider and pass upon the issue of whether, absent monopolistic power or the dangerous probability of obtaining it, unilateral management of a business lawfully acquired, even if deliberately wasteful, can constitute a combination, contract or conspiracy unreasonably restraining trade in violation of Section 1. We submit the answer is a foregone conclusion in light of this Court's holding in *Copperweld Corp. v. Independence Tube,* 52 U.S.L.W. 4821 (U.S. June 19, 1984), but because the issue is an integral part of the standing question, it should be considered with it.

II. THE STRIKING OF THE ANTITRUST DAMAGES AS SPECULATIVE AND REVERSAL OF THE PUNITIVE AWARD ON THE IMPROPER SUPPRESSION THEORY SHOULD NOT BE REVIEWED

The last two questions sought to be raised by plaintiff's petition are not worthy of consideration nor are they ripe for review by the Court.

First, as to the issue of the validity of plaintiffs' $500 million damage schedule, this is essentially a factual inquiry which presents no conflict among the circuits and no important antitrust problems. The Eighth Circuit dismissed the antitrust damages as "entirely speculative, further corroborating the lack of antitrust injury." 722 F.2d at 1374. This cursory dismissal was, if anything, an understatement. The plaintiffs to this day have never explained how "only J&J with its massive

---

has not turned out to be the panacea for pain that it appeared it might be in the early 1970's; and to our knowledge no TENS company has ever made a significant profit in the business.

resources" could have successfully promoted TENS devices while they, three individuals, could have sold TENS devices to one-quarter of the population of the Western world. Nor have plaintiffs ever explained to this day why they agreed to sell their business, which was then near bankruptcy, to J&J for $1.3 million with a contingent earnout if in fact they had a reasonable expectation of reaping these mindboggling profits on their own. Finally, plaintiffs have not explained why other established corporations such as 3M and Medtronic who are actually in the TENS business, have been able to make only infinitesimal amounts of sales compared to those which plaintiffs postulated they would have made but for their decision to sell StimTech to J&J.

Finally, plaintiffs' assertion that this Court should review the Eighth Circuit's reversal of the fraud punitive damage claim verges on the frivolous. Their principal argument is that J&J "waived" the error in plaintiffs' trying and arguing the punitive damage on the basis of the prejudicial antitrust suppression theory. They concede that they tried the punitive claim with the concurrence of the trial court on the basis that "[T]he suppression was clearly the motive for the fraud, and therefore relevant in connection with the award of punitive damages."

It ill behooves the plaintiffs to assert this alleged issue of waiver as a ground for review by this Court. Plaintiffs knew full well both at the trial and appellate levels that one of the principal points urged by J&J for reversal of all of the fraud and contract verdicts was that they were polluted by this inflammatory and prejudicial theory. Not too surprisingly, there is not a word in any of the 100 page appeal brief or 600 page judgment n.o.v. brief submitted by plaintiffs about this newly discovered "waiver".

Thus, this belated claim of waiver raised for the first time on plaintiffs' petition for rehearing to the Eighth Circuit, is not one worthy of review by this Court. Not only is it purely a factual inquiry but it is a contrived and frivolous afterthought.

Both the plaintiffs as well as the trial court were fully apprised of J&J's position as to the prejudice inherent in using this poisonous argument on the common law claims.

Respectfully submitted,

DAVID F. DOBBINS
PATTERSON, BELKNAP, WEBB
& TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Counsel for Respondent
Johnson & Johnson

Of Counsel:

GEORGE S. FRAZZA
ROGER S. FINE
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933
(201) 524-0400